IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRED WERNER,

Plaintiff,

v

QUINTUS CORPORATION, ALAN ANDERSON, PAUL BARTLETT, SUSAN SALVESON,

Defendants.

_____

AND RELATED MATTERS

_____/

No C-00-4263 VRW

ORDER

No C-00-4264 VRW
No C-00-4274 VRW
No C-00-4276 VRW
No C-00-4294 VRW
No C-00-4300 VRW
No C-00-4308 VRW
No C-00-4313 VRW
No C-00-4343 VRW
No C-00-4346 VRW
No C-00-4381 VRW
No C-00-4390 VRW
No C-00-4392 VRW
No C-00-4504 VRW
No C-00-4528 VRW
No C-00-4650 VRW
No C-00-4678 VRW
No C-00-4771 VRW
No C-01-0093 VRW
No C-01-0096 VRW
No C-01-0262 VRW
No C-01-0270 MMC
No C-01-0327 PJH
No C-00-21177 EAI

The court will conduct a case management conference in these related actions on March 8, 2001, at 10:00 am. Counsel should be prepared to discuss the pending motions to consolidate these actions, the motions to designate lead plaintiff and lead counsel and the other matters discussed below.

I

In advance of selecting a lead plaintiff, the court must address the motions to consolidate filed by the three different groups of investors and by defendants. See 15 USC § 78u-4(a)(3)(B)(ii). Twenty-four separate actions have been filed to date; three have not yet been related. Upon a preliminary review of the complaints in these actions, the relief sought appears to be the creation of a common fund or recovery on behalf of purchasers of Quintus shares, except in Brennan v Burke, et al, C-01-0327-PJH, which is a shareholder derivative suit. FRCP 42(a).

The class periods alleged in these complaints vary. The ending date for the class period in all cases is November 14 or 15, 2000. A majority of complaints allege a starting date of November 15 or 16, 1999. Several complaints allege a class period of July 20, 2000, to November 14, 2000. One complaint alleges a class period from January 19, 2000, to November 14, 2000. The actions all name Quintus, Alan Anderson and Susan Salvesen as defendants. Many also name John Burke, Paul Bartlett, Andrew Busey, Frederic Harmon, William Herman, Alexander Rosen, Robert Shaw, Jeanne Wohlers and Donaldson Lufkin & Jenrette. Counsel should be prepared to discuss the effect of these differing periods and defendants on possible class certification and representation.

II

Turning to the selection of lead plaintiff, the court recognizes that the Private Securities Litigation Reform Act (PSLRA), 15 USC § 78u-4, et seq, creates a rebuttable presumption that the named plaintiff with the largest financial interest in the action should be the lead plaintiff. 15 USC § 78u-4(a)(3)(B)(iii) (I)(bb).

In determining which proposed lead plaintiff has the largest financial stake, the court looks to individual plaintiffs, not an aggregation or group of plaintiffs. Except in two narrow circumstances, this court has rejected aggregation as a means of fulfilling the "largest financial interest" condition for the presumption under section 78u-4(a)(3)(B)(iii)(I)(bb). Wenderhold v Cylink Corp, 188 FRD 577, 586 (ND Cal 1999). Other courts have likewise rejected aggregation. See, e g, In re Network Associates, Inc Sec Lit, 76 F Supp 2d 1017, 1021-27 (ND Cal 1999); In re Telxon Corp Sec Lit, 67 F Supp 2d 803,

809-13 (ND Ohio 1999); Aronson v McKesson HBOC, Inc, 79 F Supp 2d 1146, 1153-54 (ND Cal 1999); In Re Donnkenny Inc Sec Lit, 171 FRD 156, 157 (SD NY 1997) ("To allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff."). Aggregation may be appropriate, but only under two circumstances: (1) if intra-class periods make it impossible for a single plaintiff to represent the class adequately or (2) if the group of investors, functioning as a group, is more capable than any single plaintiff at exercising effective control over the litigation consistent with the requirements of FRCP 23 and the goals of the PSLRA. Wenderhold, 188 FRD at 586. Any prospective lead plaintiff that has grounds to establish that aggregation is appropriate in these circumstances should be prepared to demonstrate those grounds at the March 8 conference.

A named plaintiff enjoys no entitlement to lead plaintiff designation simply because that plaintiff's loss exceeds the loss for any other plaintiff that has come forward. Notwithstanding the rebuttable presumption enacted by the PSLRA, the court retains an obligation to choose the most adequate representative for the class. 15 USC § 78u-4(a)(3)(B)(i). In this regard, the PSLRA mirrors the lead plaintiff adequacy requirement of FRCP 23(a)(4). In all class actions, the class representative is a fiduciary for absent class members. Cohen v Beneficial Indus Loan Corp, 337 US 541, 549 (1949). An adequate representative plaintiff is one that is willing and able to satisfy the fiduciary obligations that attend lead plaintiff status.

In the belief that in securities class actions, institutional investors are best able to satisfy the fiduciary obligations of lead plaintiff, Congress sought to increase the likelihood that institutional investors would serve as lead plaintiffs by enacting the presumption under 15 USC § 78u-4. House Conference Report No 104-369, 104th Cong 1st Sess at 34 (1995); see also Gluck v CellStar Corp, 976 F Supp 542, 548 (ND Tex 1997). Two potential lead plaintiffs appear to be institutional investors, e g, Bulldog Capital Management, LP and RJL Capital Management. The number of shares at issue for these investors, however, is less than the number for at least some individual plaintiffs. One of these investors may, however, secure designation as lead plaintiff by demonstrating that it is more capable of discharging the lead plaintiff fiduciary duties to the class than any other prospective lead plaintiff that claims to have suffered greater financial loss. The suggestion that there does not appear to be an institutional investor in this

litigation that may overcome the presumption of 15 USC § 78u-4(a)(3)(B)(iii)(I)(bb), in the court's order filed under seal on February 2, 2001, may be incorrect.

In a securities class action case, the PSLRA specifies that one of the lead plaintiff's obligations is to "select and retain counsel to represent the class." 15 USC § 78u-4(a)(3)(B)(v). Fiduciary responsibilities of the lead plaintiff to the class include ensuring the quality and reasonable cost of counsel for the class. One of the primary obligations of the lead plaintiff, therefore, is to obtain competent counsel and negotiate a reasonable fee arrangement.

The lead plaintiff's obligation to select lead counsel and negotiate an appropriate fee arrangement arises at the outset of a class action. This allows a court tasked with selecting the most adequate representative to scrutinize a proposed lead plaintiff's ability to act in that capacity. Consequently, a proposed lead plaintiff must demonstrate adequacy to serve as lead plaintiff by demonstrating the willingness and ability to take charge of the litigation and negotiate a reasonable representation arrangement with class counsel. If a proposed lead plaintiff cannot fulfill this obligation, such plaintiff is not a suitable class representative. See Baffa v Donaldson, Lufkin & Jenrette Securities, 185 FRD 172, 177 (SDNY 1999) ("The court also finds Dorflinger's choice of counsel renders her inadequate to serve as class representative.").

Accordingly, the court concludes that receiving certain information from each individual plaintiff that has applied (individually or as part of a group) to be lead plaintiff will assist the court in determining whether any of them are capable of "fairly and adequately protecting the interests of the class." 15 USC § 78u-4(a)(3)(B)(iii)(II)(aa). Each individual plaintiff that has applied to be lead plaintiff is thus directed to respond to the following inquiries by serving and filing a declaration under penalty of perjury no later than February 28, 2001:

1. Did you investigate the legal or factual basis of the claims asserted in your complaint or did you rely solely on counsel to do this?
2. Did you seek out counsel or did counsel or someone else seek out you to serve as representative plaintiff?
3. Did you contact any lawyers other than your present counsel about this action and, if so,

whom did you contact and when did you do so?

4. What did you do to negotiate a fee and expense reimbursement arrangement that promotes the best interests of the class?

5. What arrangements do you have with proposed class counsel concerning their fees and expenses?

6. What benchmarks do you have in place to measure class counsel's performance during the progress of the litigation?

7. How do you plan to monitor class counsel's conduct of the litigation?

8. Do you have any prior business, professional, family or other relationships with proposed class counsel and, if so, what are those relationships?

9. What prompted you to purchase or sell the securities at issue here on the dates on, and at the prices at, which those transactions were made?

10. Did you make inquiry or do you know whether any intermediaries through whom you made your transactions in the securities at issue have any business, professional, family or other relationships with proposed class counsel?

The court may seek additional information based on responses to the foregoing.

III

If, after reviewing the submitted declarations, the court determines that no proposed lead plaintiff has conducted an adequate selection of counsel and negotiation of a fee arrangement with counsel, the court may request that the prospective lead plaintiffs "revisit the selection [of counsel] procedure with greater attention to the fiduciary obligations inherent in the counsel selection." See Declaration of Joseph Grundfest in Aronson v McKesson HBOC, Inc, No C-99-20743-RMW (ND Cal 1999) (Grundfest Decl), ¶ 10. If, however, the court determines that none of the prospective lead plaintiffs is capable of adequately selecting and negotiating with counsel, the court has two options: (1) determine that the action may not proceed as a class action for want of an adequate class representative, see Crawford v Hong, 37 F3d 485, 487 (9th Cir 1994) (absent class members not bound by a judgment unless the representative

plaintiff is adequate); or (2) undertake to secure representation for the class on such terms as should reasonably ensure the class' interests.

If no prospective lead plaintiff adequately represents the class, the court assumes (for present purposes) that it has an obligation to conduct a search for adequate representation of the class. Under the PSLRA, the selection of lead counsel is "subject to the approval of the court." 15 USC § 78u-4(a)(3)(B)(v). This statutory delegation, along with "the court's fiduciary obligation to the plaintiff class," In re Wells Fargo Sec Lit, 157 FRD 467, 468 (ND Cal 1994), requires the court to ensure that qualified, competitively-priced counsel is selected. Thus, if the court determines that no prospective lead plaintiff has the ability to negotiate with counsel on behalf of the class, the court must itself intervene to ensure that the interests of the class are protected. See Wenderhold, 188 FRD at 587.

If the court determines that intervention is necessary, the court is considering appointing a special master, pursuant to FRCP 53. The court has in the past overseen the selection of counsel directly. See In re Oracle Sec Lit, 132 FRD 538 (ND Cal 1990); 136 FRD 639 (ND Cal 1991); In re Wells Fargo, 157 FRD 467; Wenderhold, 188 FRD 577. While that approach yielded notable advantages for the class in those cases, the court recognizes the possibility (and, perhaps more importantly, the possible appearance) of the court prejudging the merits of the case. Consideration of a fee arrangement necessarily entails conjecture about the likelihood of success of a case, the likelihood of settlement and the possible timing of settlement. See Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 FRD 237, 256 (1985). This places the court in the anomalous position of having to speculate about its own future decisions. Appointment of a special master to assist in the selection of counsel may obviate this problem.

The special master would be expected to attempt to choose counsel in a way that emulates the choice that market forces would dictate if lead plaintiff were able effectively to negotiate with prospective counsel. See Grundfest Decl ¶ 21 ("Experience establishes that the most effective way to achieve the goal of retaining the highest quality representation at the lowest price is to invoke marketplace competition among interested, qualified attorneys at the outset of the litigation * * * ."); In re Wells Fargo, 157 FRD at 468 ("In performing this analysis, the court must strive to emulate the arrangements and

decisions that the class itself would make were it able to negotiate."). Invoking the market to select counsel will likely lead to greater net recovery by the class. See Grundfest Decl ¶21-24.

Payment of the special master is a practical concern. The court believes that if a special master is used the firm eventually chosen to represent the class should pay the fees incurred by the special master. Thus, the court will require any firm seeking to be named lead counsel to agree to pay the special master's fee at the end of the selection process if that firm is chosen to be lead counsel. Before submitting a bid, each firm would be required to submit a letter of credit evidencing its ability to pay the special master's fees and expenses.

The court invites counsel to respond to this proposed procedure. Counsel may submit, no later than February 28, 2001, a memorandum of up to 15 pages along with the declarations requested in Part II.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge